IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.21 OF 2006

IN

SUMMARY SUIT NO.2021 OF 2003

Divya International L.L.C. & Ors. ...Plaintiffs

vs.

M/s.Klenzaids Contamination Controls Pvt.Ltd. ...Defendant.

Mr.Virag Tulzapurkar with Hemang Engineer i/b. M/s.Gordhandas & Fozdar, for Plaintiffs.

Mr.K.J.Hakani, for Defendant.

CORAM: D.K.DESHMUKH,J.

DATED: 8th June, 2006.

P.C.:-

1. This is a summary suit filed by the plaintiff for recovery of the amount which, according to the plaintiffs, was paid to the defendant no.1 as advance. The suit is based on the Indemnity bond at "Exhibit E" executed by the defendant no.1 and the

Deed of Guarantee executed by the defendant no.2. It is common ground that the total amount of advance that was to be paid by the plaintiffs to the defendant no.1 was US dollar 1,20,000/-. There is identical term in that Deed of Guarantee and the Indemnity Bond which reads as under:-

> "This deed of indemnity will become valid immediately but only after Buyer have effected the entire advance payment."

Thus, the deed of guarantee and the deed of indemnity executed by defendant no.1 and defendant no.2 on which the present suit is based were to become effective on the plaintiff paying to the defendant no.1 US dollar 1,20,000/-. According to the plaintiffs, out of this amount of US dollar 1,20,000/-, US dollar 50,000/- were paid on 6.4.1999. The defendant no.1 also accepts that this amount was paid. According to the plaintiffs, US dollar 49,972.50/- were paid on 18.4.1999. The plaintiffs rely on the document at Exhibit C-1 to contend that this amount was paid by the plaintiffs to the

defendant no.1. The plaintiffs claim that the balance amount was paid from time to time by the plaintiffs to the defendants. So far as the payment of this balance amount is concerned, admittedly, there is no document produced by the plaintiffs to establish that this amount was paid by the plaintiffs to defendant no.1. So far as the defendants are concerned, they are denying that the amount of US dollar 49,972.50/- was paid by the plaintiffs to them. They have also denied the receipt of the balance amount which the plaintiffs claim to have paid. There is some controversy whether the amount of US dollar 49,972.50/- which has admittedly been paid by a party by name M/s.Klenzaids Contamination Controls(P) Ltd. was paid on behalf of the plaintiffs or that payment was made by that party on its own pursuant to independent contract between that party and defendant no.1. But there is no controversy that the plaintiffs do not hold any document to show that the balance amount equivalent to Rs.16,00,000/- (Rupees Sixteen Lakhs only) out of total amount of advance that the plaintiffs had agreed to pay to the defendant no.1 was actually paid to defendant no.1.

Thus, today on the basis of the material available on record it cannot be definitely said that the entire amount of advance was paid by the plaintiffs to the defendant no.1. If today, it cannot be established that the entire amount of advance was paid by the plaintiff to the defendant no.1, then in terms of the stipulation in the Deed of Guarantee as also in the Indemnity Bond, the Indemnity Bond and the deed of Guarantee would not come into force. It means that today it prima facie appears that the Indemnity bond and the deed of guarantee on which this suit is based, themselves have not come into force and therefore, in my opinion, it will not be appropriate to pass a decree in favour of the plaintiffs in a summary suit without trial. It is further to be seen here that the finding which is invited by the plaintiffs that the amount of US dollar 49,972.50/- though paid by a third party which, according to the plaintiffs, is a sister-concern, is paid on behalf of the plaintiff, for recording that finding even according to the plaintiffs, the plaintiffs will have to lead oral evidence.

2. Taking overall view of the matter therefore, in my opinion, it cannot be said that the defence put forth by the defendants is not substantial, therefore, the defendants, in my opinion, are entitled to leave to defend the suit. The summons for judgment is disposed of. The defendants are granted leave to defend the suit. The defendants to file written statement within a period of Eight weeks.